

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

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5 In the Matter of:

6

7 SEARS HOLDINGS CORPORATION,

8

9 Debtors.

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11

12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15

16 October 15, 2020

17 10:05 AM

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21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: UNKNOWN

1 HEARING re Fifth Application of Weil, Gotshal & Manges LLP,
2 as Attorneys for the Debtors, for Interim Allowance of
3 Compensation for Professional Services Rendered and
4 Reimbursement of Actual and Necessary Expenses Incurred from
5 3/1/2020 to 6/30/2020, fee: \$2,891,566.50, expenses:
6 \$285,632.99. filed by Weil, Gotshal & Manges LLP. (ECF
7 #8403)

8
9 HEARING re Fifth Interim Fee Application of Prime Clerk LLC,
10 as Administrative Agent to the Debtors, for Services
11 Rendered and Reimbursement of Expenses for The Period from
12 March 1, 2020 through June 30, 2020 Filed by Adam M. Adler
13 on behalf of Prime Clerk LLC. (ECF #8377)

14
15 HEARING re Fourth Joint Application of Paul E. Harner, as
16 Fee Examiner and Ballard Spahr LLP, as Counsel to the Fee
17 Examiner for Interim Allowance of Compensation for
18 Professional Services Rendered and Reimbursement of Actual
19 and Necessary Expenses Incurred from 3/1/2020 to 6/30/2020,
20 fee: \$233796.00, expenses: \$160.71. filed by Fee Examiner.
21 (ECF #8399)

1 HEARING re Fifth Interim Fee Application of Akin Gump
2 Strauss Hauer & Feld LLP as Counsel to the Official
3 Committee of Unsecured Creditors for Allowance of
4 Compensation for Services Rendered and Reimbursement of
5 Expenses for the Period : 3/1/2020 to 6/30/2020, fee:
6 \$7,085,203.50, expenses: \$2,373,813.28. filed by Akin Gump
7 Strauss Hauer & Feld LLP. (ECF #8378)

8
9 HEARING re Fifth Interim Application of FTI Consulting,
10 Inc., Financial Advisor to the Official Committee of
11 Unsecured Creditors of Sears Holding Corporation, et al. for
12 Interim Allowance of Compensation and Reimbursement of
13 Expenses for the Period f 3/1/2020 to 6/30/2020, fee:
14 \$216,621.50, expenses: \$70.00. filed by FTI CONSULTING, INC.
15 (ECF #8379)

16
17 HEARING re Declaration (Supplemental) of Matthew Diaz in
18 Support of the Application for Entry of an Order Authorizing
19 the Retention and Employment of FTI Consulting, Inc. as
20 Financial Advisor to the Official Committee of Unsecured
21 Creditors Nunc Pro Tunc to October 25, 2018 (related
22 document(s)1074) filed by Ira S. Dizengoff on behalf of
23 Official Committee of Unsecured Creditors of Sears Holdings
24 Corporation, et al. (ECF #8412)

25

1 HEARING re Second Application for Interim Professional
2 Compensation for Herrick, Feinstein LLP, Special Counsel,
3 period: 3/1/2020 to 6/30/2020, fee: \$1,185,248.50, expenses:
4 \$117,625.05. filed by Herrick, Feinstein LLP. (ECF #8374)
5 Final Application of Houlihan Lokey Capital, Inc.,
6 Investment Banker to the Official Committee of Unsecured
7 Creditors, for Allowance of Compensation for Professional
8 Services Rendered and Reimbursement of Actual and Necessary
9 Expenses Incurred from 10/29/2018 to 10/31/2019, fee:
10 \$9,875,000.00, expenses: \$111,517.76. filed by Houlihan
11 Lokey Capital, Inc. (ECF #8380)

12
13 HEARING re First Application for Interim Professional
14 Compensation OF MORITT HOCK & HAMROFF LLP AS SPECIAL
15 CONFLICTS COUNSEL TO THE OFFICIAL COMMITTEE OF UNSECURED
16 CREDITORS FOR ALLOWANCE OF COMPENSATION FOR SERVICES
17 RENDERED AND REIMBURSEMENT OF EXPENSES period: 1/2/2020 to
18 6/30/2020, fee: \$215677.50, expenses: \$7,954.53, and
19 period: 1/2/2020 to 6/30/2020, fee: \$215677.50, expenses:
20 \$7,954.53. filed by James P Chou. (ECF #8375)

21
22 HEARING re Motion for Omnibus Objection to Claim(s) /
23 Debtors First Omnibus Objection to Proofs of Claim
24 (Satisfied Claims). (ECF #4775)

25

1 HEARING re Shaw Industries, Inc.'s Opposition Regarding
2 Debtors' First Omnibus Objection to Proofs of Claim
3 (Satisfied Claims). (ECF No. 5156)
4

5 HEARING re Debtors' Reply in Support of Debtors' First
6 Omnibus Objection to Proofs of Claim (Satisfied Claims)
7 (related document(s) 5156, 4775) filed by Garrett A. Fail on
8 behalf of Sears Holdings Corporation. (ECF #8958)
9

10 HEARING re Debtors Tenth Omnibus Objection to Proofs of
11 Claim (To Reclassify Claims). (ECF #5237)
12

13 HEARING re Infiiloom India Private Limited's Response. (ECF
14 No. 5394)
15

16 HEARING re Winners Industry Company, Ltd.'s Response. (ECF
17 No. 5400)
18

19 HEARING re Orient Craft Ltd.'s Opposition. (ECF Nos. 5496
20 and 5497)
21

22 HEARING re Response of HK Sino-Thai Trading Company LTD.
23 (ECF No. 6037)
24

25 HEARING re Debtors' Omnibus Reply in Support. (ECF No. 6372)

1 HEARING re Debtors Eleventh Omnibus Objection to Proofs of
2 Claim (To Reclassify or Disallow Certain Claims). (ECF
3 #7213)

4

5 HEARING re Response of Xiamen Luxinjia Imp & Exp Co Ltd. in
6 Opposition. (ECF No. 7372)

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

2

3 WEIL GOTSHAL & MANGES LLP

4 Attorneys for Debtors

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8 BY: GARRETT FAIL (TELEPHONICALLY)

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12 BALLARD SPAHR LLP

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17 BY: PAUL HARNER (TELEPHONICALLY)

18 VINCENT MARRIOTT (TELEPHONICALLY)

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20 BRYAN CAVE LEIGHTON PAISNER LLP

21 Attorneys for Shaw Industries, Inc.

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23 Atlanta, GA 30309

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25 BY: MARK DUEDALL (TELEPHONICALLY)

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6 BY: DAVID WANDER (TELEPHONICALLY)

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8 UNITED STATES DEPARTMENT OF JUSTICE

9 Attorneys for The United States Trustee

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13 BY: PAUL SCHWARTZBERG (TELEPHONICALLY)

14

15 ALSO APPEARING:

16 SAUL BURIAN (TELEPHONICALLY)

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1 P R O C E E D I N G S

2 THE COURT: Good morning, this is Judge Drain.

3 We're here in In re Sears Holdings Corp., et al. This is a
4 completely telephonic hearing. You should identify yourself
5 and your client the first time you speak. It's a good idea
6 to do so again if someone speaks between you and the next
7 time you speak so that the court reporter can put together
8 your voice with your name.

9 There is one authorized recording of this hearing.
10 It's taken by CourtSolutions. If you want to order a
11 transcript, you should contact our clerk's office to arrange
12 for the preparation of one.

13 Lastly, you should keep your phone on mute unless
14 you're speaking, at which point of course you should unmute
15 yourself.

16 So with that being said, I have the proposed
17 agenda for today's omnibus hearing and I'm happy to go down
18 the agenda unless the Debtors want to vary it or provide any
19 other information before we start.

20 MR. FAIL: Thank you, Your Honor. Good morning,
21 it's Garrett Fail from Weil Gotshal & Manges on behalf of
22 the Sears debtors. Are you able to hear me, Your Honor?

23 THE COURT: Yes, I can hear you fine. Thanks.

24 MR. FAIL: Thank you very much. We are happy to
25 proceed in the order that the items appear on the agenda.

1 THE COURT: Okay.

2 MR. FAIL: The first section are uncontested fee
3 applications. They include Weil Gotshal, Prime Clerk, and
4 Mr. Harner as the fee examiner, Akin Gump, FTI Consulting,
5 Herrick Feinstein, and Houlihan Lokey, and Moritt Hawk &
6 Hamroff. As noted on the agenda, each of the applications
7 is uncontested. If Your Honor grants the applications, we
8 will provide, as we have in the past, a combined order
9 granting them, reserving the rights with respect to all of
10 the interim applications on behalf of the fee examiner. And
11 that has been included before.

12 THE COURT: So let me -- I've reviewed the
13 applications, and I will note that they are unopposed. We
14 have a fee examiner in this case, as you've noted, Mr.
15 Harner. And I see you're on the phone. Let me ask you, Mr.
16 Harner, what is the status of your review of the fees that
17 are before me this morning? Do they reflect your full
18 review and any input or any discussions that you had with
19 the professionals, or is that process still underway?

20 MR. HARNER: Your Honor, it's in varying states of
21 completion with respect to both fees and all prior interim
22 fee applications. We have completed and submitted to the
23 professionals preliminary reports with respect to the vast
24 majority of those applications and are nearing completion on
25 the remainder as to which we have not yet submitted

1 preliminary reports.

2 As you'll recall Your Honor's order with respect
3 to the fee examination process contemplates the submission
4 of those reports and then a negotiation process that is
5 protected by Rule 408 as settlement communications.

6 Candidly, we are awaiting both the provision of some
7 requested information and responses to preliminary
8 objections on a substantive level from various of
9 professionals. We do remain cautiously optimistic that they
10 will all ultimately be resolved on a consensual basis.
11 Several of them in fact have been with respect to earlier
12 applications, and either will be reflected in final fee
13 orders or already have been. But those discussions are
14 ongoing, subject of course to the provision of information
15 that we have requested and the substantive responses that we
16 are awaiting, as I indicated.

17 THE COURT: Okay. So, I obviously don't know and
18 don't need to know the full extent of your recommendations
19 to the various professionals on their fees, and it sounds
20 like that process is still ongoing. These are interim
21 applications. For some professionals, it's clear to me that
22 their work is, if not winding down completely, going to be
23 reduced for future periods beyond the period covered by
24 these applications. On the other hand, these are all rather
25 large firms. What I'm leading up to is whether you believe

1 there should be a larger holdback in respect of any of these
2 applications because of a concern that potential objections
3 that you might have or resolutions would require
4 disgorgement as opposed to just not my awarding final unpaid
5 amounts.

6 MR. HARNER: Your Honor, just a couple of -- it's
7 Paul Harner again, the fee examiner. Just a couple of
8 observations in that regard. First, you're not only correct
9 that several of the firms are winding down. There are
10 several firms that were very active at the beginning stages
11 of the case that have now in fact completed their
12 engagements. And in fact, we either have seen or will see
13 final fee applications very shortly from those firms subject
14 to final resolution of whatever objections we either have
15 raised or intend to raise with those firms and are currently
16 negotiating.

17 The process that I ultimately envision if I am
18 correct -- and again, I remain hopefully optimistic in this
19 regard -- is that at the conclusion of the cases, you will
20 see a final report from us that reflects those consensual
21 agreements with each of those firms.

22 Your Honor may also recall that at the last
23 interim fee application hearing, we had a discussion about
24 the disgorgement issue. And without putting any words in
25 the Court's mouth, I believe that you made clear that to the

1 extent that any agreements or, hopefully not, but to the
2 extent that any objections had to be litigated, the Court
3 ordered fee reductions that required disgorgement that in
4 fact prior fee payments would be subject to disgorgement.
5 But I am not of the view, and remain not of the view, that
6 it's necessary to increase any holdbacks at this point
7 precisely be the firms involved here, particularly those
8 that have the largest of the interim, and ultimately final
9 fee applications, are of sufficient financial wherewithal
10 that I do not have any concern about their ability either on
11 a consensual or court-ordered basis to disgorge.

12 So that is a long way of saying that I do not
13 believe and do not recommend any additional holdback beyond
14 what is already provided in the interim compensation order
15 entered by Your Honor at the outset of the case.

16 THE COURT: Okay. That's helpful. Thank you.
17 And it's consistent with my understanding here.

18 So that leaves just one application, which I have
19 a question about. Sort of going along the lines of what
20 we've just been talking about. The Houlihan Lokey
21 application is described as a final application. Is that
22 one that you have resolved with them, or even though it's
23 couched as final, it will still have a reservation as to the
24 fee examiner and ultimately the Court? Did I lose you?

25 MR. HARNER: Your Honor, I apologize. I pressed

1 mute when I intended to press unmute. I didn't realize I
2 was already unmuted.

3 THE COURT: Oh, that's fine.

4 MR. HARNER: I'm scrabbling, Your Honor, to find
5 this on my computerized files, but I'm going to ask my
6 colleague, Mr. Marriott to confirm. I believe we did not
7 have any objection to the Houlihan Lokey fee application,
8 which was, by the way, largely success fee based. But if he
9 has a different recollection, now would be the time for him
10 to speak up.

11 THE COURT: Okay.

12 MR. MARRIOTT: Good morning, Your Honor. Vince
13 Marriott, Ballard Spahr, representing Mr. Harner as fee
14 examiner. My recollection is the same as Mr. Harner's.

15 THE COURT: Okay. So this is the end of
16 Houlihan's work in the case then. They're not providing any
17 more services as investment banker to the committee. Which
18 --

19 MR. BURIAN: Your Honor, it's Saul Burian from
20 Houlihan Lokey.

21 THE COURT: Yes. Good morning.

22 MR. BURIAN: Good morning, Your Honor. After
23 conversations with our committee and at the suggestion of
24 Akin Gump, in order to minimize expense on the estates,
25 notwithstanding that we were not yet final, we stopped

1 billing monthlies and expenses quite a while ago. And while
2 we were available for consultation, we no longer felt it was
3 appropriate to bill the estate pursuant to our retention
4 letter. So what you have before you is our final fee app
5 with no charges during the past -- I can't remember how many
6 months. My understanding is the fee examiner had no
7 comments to our application. Our expenses, especially with
8 this being in a White Plains courtroom, were quite minimal.
9 And we are seeking a final approval today.

10 THE COURT: Okay. That's fine.

11 MR. HARNER: And, Your Honor, it's Paul Harner
12 again, as the fee examiner. I apologize to the Court for
13 not having been able earlier to locate my electronic file,
14 but I did in fact locate my confirmation that after
15 examination, we did not have any objection. And to the
16 extent that I failed to formally communicate that to Mr.
17 Burian, I apologize both to him and to the court. But we do
18 in fact have no objection to the final application.

19 THE COURT: Okay, great. Thank you. Have there
20 been any changes to the amounts sought from what is set
21 forth in each application? I guess that's a question for
22 Mr. Fail ultimately.

23 MR. FAIL: Apologies, Your Honor. Can you repeat
24 the question.

25 THE COURT: Sure. Have there been any changes to

1 the amounts sought by any of the professionals from what is
2 sought in the applications as filed?

3 MR. FAIL: Thank you, Your Honor. Garrett Fail,
4 Weil Gotshal, for the record. The debtors, we have not been
5 informed of any, and we will circulate, as we have in the
6 past, the form of proposed order to each of the affected
7 professionals for their signoff. And if there's any changes
8 that they've negotiated or any corrections, we'll make them
9 before we submit the order to chambers.

10 THE COURT: Okay, very well. And does the U.S.
11 Trustee have any comments on any of the applications?

12 MR. SCHWARTZBERG: No, your -- excuse me. Paul
13 Schwartzberg for the U.S. Trustee's Office. No, Your Honor.

14 THE COURT: Okay. All right. Thank you.

15 As I said, I have reviewed each of the
16 applications, each of which is interim except for the
17 Houlihan Lokey application. And based on the record today,
18 not only do I grant the applications as sought, but I am
19 reasonably comfortable that I don't need any further
20 holdback, notwithstanding the clear reservation of rights
21 for the fee examiner and that process which is ongoing.

22 So I'll ask the Debtors to submit one order that
23 covers all of the application, noting that the Houlihan one
24 is a final application, and that will be entered.

25 MR. FAIL: Thank you, Your Honor.

1 MR. HARNER: Your Honor, Paul Harner as the fee
2 examiner. With that, may Mr. Marriott and I be excused?

3 THE COURT: Yes, that's fine. And anyone who is
4 on just for the fee apps can also ring off at this point.

5 MR. HARNER: Thank you very much, Your Honor.

6 THE COURT: So, Mr. Fail, before we go to the rest
7 of the agenda, I did have one question. Originally on the
8 agenda was the Debtors' motion for approval of a second APA
9 settlement between the Debtors and Transform Holdco. Unlike
10 some of the other matters that had been on the agenda that
11 are now listed as being adjourned or being resolved, this
12 one doesn't appear anymore. Do you know the status of it?

13 MR. FAIL: Thank you, Your Honor. Garrett Fail,
14 Weil Gotshal. My understanding was that a certificate of no
15 objection was filed with respect to that. And I'm just
16 going on the docket right now to see if that's the case.
17 Probably Jennifer Crozier may be on the line to respond if
18 she is --

19 THE COURT: It's possible I -- I'm sorry to
20 interrupt you. It's possible I may have sent the order in,
21 but I don't recall it. So could someone at Weil just double
22 check? And if the order approving it has not been entered,
23 could you have them email or re-email the proposed order to
24 chambers along with a certificate of no objection, and it
25 will get entered.

1 I've reviewed the motion, which I believe is
2 unopposed. I didn't know whether it had been adjourned or
3 not. So if it's not been adjourned, then there's no reason
4 not to grant it.

5 MR. FAIL: Thank you, Judge. It was not
6 adjourned. We will resubmit the order. As of last night, I
7 know it had not been entered. I will follow up while we're
8 on the hearing. It's at Docket 8960 I'm being told, is the
9 certificate of no objection.

10 THE COURT: Okay.

11 MR. FAIL: But we'll get that submitted.

12 THE COURT: Very well. So otherwise, why don't we
13 just keep going down the agenda.

14 MR. FAIL: Thanks very much, Judge. The next item
15 on the agenda has been carried for some time. It's the
16 Debtors' first omnibus objection to claims. With Your
17 Honor's permission, I'll cede the podium to my colleague,
18 Michael Buschmann.

19 One housekeeping note, Judge. And you've granted
20 this request in the past for others. Mr. Buschmann is
21 admitted in the State of New York. His admission to the
22 Southern District is pending. I think it's been delayed
23 given the corona crisis. With Your Honor's permission, we
24 would ask that he be admitted either pro hoc or for purposes
25 of this hearing only to present this objection.

1 THE COURT: That's fine. If it's just for this
2 hearing, then that's fine. If he's going to be appearing in
3 other matters in this case, then he should do a pro hoc
4 application.

5 MR. FAIL: Thank you, Judge.

6 THE COURT: Okay.

7 MR. BUSCHMANN: Thank you, Your Honor. This is
8 Michael Buschmann on behalf of Weil Gotshal & Manges for the
9 Debtors.

10 The next item on the agenda is matter number nine,
11 which relates to the Debtors' first omnibus objection. As
12 my colleague, Garrett Fail, mentioned, this has been
13 adjourned from time to time. And while we have been
14 successful in resolving most claims objections in this case,
15 this particular claim we need to seek the Court's judgement
16 on.

17 To summarize the objection and reply, the first
18 omnibus objection objects on the grounds that Debtors have
19 no liability for all claims listed, as those claims have
20 been satisfied either by the Debtors or through assumption
21 and assignment to Transform.

22 To summarize our reply, the response to Shaw
23 Industries to the Debtors' first omnibus objection tries to
24 put forth a factual scenario that the pleadings in this case
25 do not support. Shaw Industries alleges that on the date

1 they filed their objection, their claim had not been assumed
2 and assigned to Transform and that there was still a cure
3 amount allegedly owing.

4 As detailed in the reply, based on cure costs
5 notices and assumption and assignment notices set forth in
6 this case, the cure cost for their claim was fixed and the
7 assignment took place. Shaw Industries simply cannot use
8 this claims objection process to attempt to raise late
9 objections to those facts.

10 To the extent there are ongoing negotiations or a
11 dispute between Shaw and Transform over some agreement
12 reached for their contract assumption, as they allege in
13 their response, that is a question for different parties
14 under a different pleading at a different time.

15 The Debtors are willing to make sure that all
16 rights are reserved with respect to any such dispute between
17 Transform and Shaw. But what is clear now is that the
18 Debtors and their estates have no further involvement with
19 Shaw Industries for their contracts. The Debtors ask that
20 the objection be upheld with regards to this claim to free
21 up reserved estate assets for other claimants with valid
22 claims against the estate.

23 I am happy to answer any questions you may have at
24 this time or go into more detail regarding the response or
25 respond to anything other parties might have to say.

1 THE COURT: Okay. Well, I have reviewed the
2 pleadings on this and the underlying orders, so at this
3 point I don't have any questions. I think I see Counsel for
4 Shaw Industries on the phone. So I'm happy to hear from
5 them.

6 MR. DUEDALL: Hello, Judge. This is Mark Duedall
7 with the firm of Bryan Cave out of Atlanta. I am counsel
8 for Shaw. Can Your Honor hear me?

9 THE COURT: Yes, I can hear you fine. Thanks.

10 MR. DUEDALL: Thank you, Judge Drain. Judge
11 Drain, as indicated in our response, Shaw has no interest
12 and no desire to relitigate cure amounts. That's not what
13 we do. We don't wish to revisit procedures that were
14 established by this Court in this case or in other cases.

15 The challenge here is an open factual issue. And
16 it's even made more bare by the Debtors' reply that they
17 filed I believe on Tuesday. And that is if the contract was
18 assumed, then there should be no preference claim. And we
19 are very curious why a preference claim was brought on a
20 contract that was assumed.

21 The Debtors' reply indicates that first they file
22 da notice setting forth that the cure amount is zero, to
23 which Shaw did not respond. As a factual matter,
24 Transformco made it clear it was willing to assume Shaw's
25 contract only if it had to pay a cure amount

1 (indiscernible). And that's perfectly appropriate. Buyers
2 of assets in bankruptcy do that routinely. It is their
3 right.

4 Shaw indicted that, you know, that would be fine.
5 But then Transformco indicated and it wanted extended credit
6 terms, which is something Shaw was not willing to agree to
7 unless there was a cure payment.

8 And then you had, as indicated in the reply -- not
9 Shaw's response, but in the reply -- a subsequent cure
10 notice saying cure amount agreed to, which is not correct.
11 There has been no cure amount paid. There has been no cure
12 amount agreed to. Terms have not been extended. Shaw
13 continues to do business with Transformco on a PO basis.
14 And we are in a rather weird factual situation where the
15 Debtor filed two cure notices that are inconsistent. No
16 cure amount has been paid, although it said cure amount
17 agreed to in the second notice. And then Shaw was sued on a
18 preference, which is entirely inconsistent. Entirely
19 inconsistent with what the Debtors allege in terms of
20 assumption.

21 So, Your Honor, we have a very unclear factual
22 record here. We've had discussions with Sears' counsel for
23 some time. Mr. Buschmann and Mr. Fail were all puzzled by
24 this. I've had discussions myself with Transformco's in-
25 house counsel, which has indicated, yes, no cure amount was

1 ever paid. And they've asked again for trade terms, and
2 Shaw has said no. And that's not before Your Honor at all.
3 But it informs the unclear factual record on was there an
4 assumption, was there an assumption with an agreed cure
5 amount, which no one seems to know what that agreed cure
6 amount was, as the Debtors' second notice indicates. Was
7 there an assumption on the condition of Shaw extending terms
8 to Transformco, which Shaw did not, and the parties
9 continued to do business? And was there an assumption and
10 yet still a preference point, which there undoubtedly is.
11 There undoubtedly is.

12 So, Your Honor, we have a very unclear factual
13 record here on whether assumption has taken place, in my
14 view.

15 THE COURT: Okay. Well, I agree with you that
16 upon the assumption and assignment of the contract, that
17 fact would negate a preference claim. But I think I tend to
18 disagree with you about the rest of the record.

19 Looking through the relevant orders, it appears
20 clear to me that those orders provide that transform, or its
21 designee, had a specific deadline to take an assignment of a
22 contract, that the contracts with Shaw were identified
23 timely for assumption and assignment, and that the relevant
24 orders, which I'll go through in a minute, provided for the
25 assumption and assignment and that those orders also

1 provided that the failure to object to the cure notice would
2 result in there being no cure beyond what was set forth in
3 the notice.

4 As to the point regarding the parties, that is the
5 discussions between Transform and Shaw Industries regarding
6 any amendments to the agreement as part of the assumption
7 and assignment. Both the APA order from February 8, 2019,
8 as well as the additional assumption and assignment order,
9 i.e. the order applying to addition assumption and
10 assignments from March 26th, 2019, both of those orders gave
11 Transform and the non-debtor parties the flexibility to
12 negotiate a new agreement or a modified agreement, but then
13 went on to say, "And any such agreement shall require the
14 counterparties' waiver of any and all prepetition claims
15 against the Debtors based on the assignment agreement." So
16 it appears to me clear that while there may be some right
17 that Shaw Industries has against Transform in return for a
18 modified agreement with Transform, as far as the Debtors are
19 concerned, Shaw has no cure claim. So the agreement has
20 been assigned. The parties are free to modify it. The new
21 parties to the agreement, namely, Shaw and Transform. But
22 as far as the Debtors are concerned, there is no claim
23 against them. I mean, once Transform designates a contract
24 to be assumed and assigned for it, I don't see any
25 provision, and none has been sent to me, that it can then

1 change its mind, unless it does so within the deadline,
2 which has long past at this point. So it appears to me
3 that, again, while there may be a right to obtain more value
4 from Transform in return for value being provided to
5 Transform in a modified agreement, as far as the Debtors are
6 concerned, there's no claim.

7 MR. DUEDALL: This is Mark Duedall, Your Honor.
8 May I respond?

9 THE COURT: Sure.

10 MR. DUEDALL: Thank you, Judge. And we agree.
11 Matters between Shaw and Transformco are not here today and
12 have never yet been before Your Honor. It's a good customer
13 of Shaw going forward, and we are pleased to have them as
14 such. We do not intend to get the benefit without the
15 burden, that is continued doing business with Transformco.
16 But we do not seek to have the burden imposed on us without
17 the benefit, which is why the preference claim was brought.

18 THE COURT: Well, that's fine. I understand the
19 preference point. And I expect that upon entry of an order
20 granting this claim objection on the basis that the contract
21 has been assumed and assigned, that they would withdraw the
22 preference claim.

23 MR. DUEDALL: If that is the case, Your Honor,
24 then I believe the baby has been split appropriately.

25 THE COURT: Okay. All right. Mr. Buschmann, am I

1 missing anything here?

2 MR. BUSCHMANN: No, Your Honor. This is Michael
3 Buschmann on behalf of the Debtors. I think that's a fairly
4 accurate assessment in regards to the preference action.
5 We've been in discussions with the folks over here running
6 those preference actions, and they agree that this claims
7 objection and that preference action are sort of one negates
8 the other.

9 In the event that this goes forward today, I
10 think we're all aligned in that that preference action would
11 have no merit going forward. Not to speak for them on the
12 record, but that's our understanding.

13 THE COURT: All right. Okay. So I will grant the
14 Debtors' objection and overrule Shaw Industries' opposition
15 to the claim objection based on first the Court's bidding
16 procedures order from November 19th, 2018, which approved in
17 Paragraphs 28 through 32 assumption and assignment
18 procedures in connection with the ultimately to-be-approved
19 sale transaction for executory contracts on expired leases,
20 including the sending of a notice of cure costs regarding
21 potential assumption and assignment of executory contracts.

22 And Paragraph 33 of that order, which clearly
23 provided that if there were no objections to such a notice,
24 the non-debtor party to the contract would be bound by the
25 cure amount set forth in the notice. Such a notice was sent

1 on or around November 19th. I'm sorry, on or around January
2 23, 2019, including to Shaw Industries, alerting it that its
3 contract or contracts might in fact be assumed and assigned,
4 noting that the buyer had flexibility within certain
5 deadlines to designate contracts for assumption of
6 assignment, and also listing the cure amount at zero dollars
7 and stating in bold uppercase print that the counterparty
8 fails to file with the bankruptcy court and serve on the
9 objection recipients a timely cure objection, the
10 counterparties shall be barred from asserting any objection.
11 With regard to the amount to cure, I need to follow up under
12 the applicable contract.

13 There was no objection by Shaw Industries. I
14 later, about three weeks later, approved the APA
15 transaction, including the assumption and assignment
16 provisions under it in an order dated February 18th, 2019.
17 It contained many paragraphs pertaining to the assumption
18 and assignment of the signed agreements, starting at
19 Paragraph 28, as applicable here. It dealt with cure costs
20 in Paragraph 29. And as I noted during discussion on the
21 motion, provided that the non-debtor party to the contract
22 and Transform would have the flexibility to negotiate new
23 terms, but that any new agreement would require the waiver
24 of any and all pre-petition claims against the Debtors other
25 than, of course, any actual cure costs that have not been

1 waived or that had been set by the notice.

2 Paragraph 30 memorialized the bar of cure claims
3 beyond the notice amount. And Paragraph 32 did it again
4 just in case no one was comfortable with Paragraph 30. As
5 did Paragraph 34, which often happens, I guess, in these
6 types of orders that take paragraphs from different models.

7 The APA order and the underlying agreement gave
8 Transform an additional period to designate more contracts
9 to be assumed and assigned. It did so. And, consistent
10 with the bidding procedures order and the provisions of it
11 dealing with the assumption and assignment of contracts,
12 another notice was sent out and an order was entered dated
13 March 26th, 2019, which had the same type of language in it
14 that I've already referred to other than noting the original
15 cure notice and the fact that the non-debtor parties was
16 bound by it. And Paragraphs -- including Paragraph 13 and
17 17 of the order again barred assertion of additional cure
18 claims against the Debtor.

19 So as far as the claim against the Debtor is
20 concerned, those claims are obviously, to the extent we're
21 above zero dollar, i.e. the whole claim should be disallowed
22 under those prior orders. That's without prejudice to Shaw
23 Industries' rights against Transform. And further, as the
24 record reflects, by recognizing the assumption and
25 assignment of the contract, which means that the contract

1 debt is paid in full and would have to be paid in full,
2 there would be no preference claim. The fact of a
3 preference claim wasn't identified. There was no preference
4 complaint filed when the cure notice went out. And under
5 those circumstances, I believe it would be unfair to hold
6 Shaw Industries to a waiver of any claim it would have under
7 Section 502(b) if it paid a preference, which of course
8 would be a cure claim that would have to be paid as a
9 condition of assumption. And the record reflects that
10 resolution.

11 So I'll look for the order granting the objection.
12 I forget whether I've already entered an order with regard
13 to the other claims covered by the first omnibus claim
14 objection. If I have it, obviously, it will include all of
15 those claims.

16 You don't have to formally settle that order on
17 counsel for Transform, but you should -- I'm sorry, counsel
18 for Shaw Industries, but you should email a copy to Mr.
19 Duedall so he can make sure it's consistent with my ruling
20 before you send it to chambers.

21 MR. BUSCHMANN: Yes, Your Honor. Michael
22 Buschmann. We will do so.

23 THE COURT: Okay. So, Mr. Buschmann, I have to
24 ask, are you related to Howard Buschmann?

25 MR. BUSCHMANN: Not that I'm aware of, but it's

1 not a very common last name, so maybe.

2 THE COURT: All right. He was the first
3 bankruptcy judge I appeared in front of, so I was curious.

4 All right, so I'll look for that order.

5 MR. BUSCHMANN: Thank you, Your Honor.

6 MR. FAIL: Thank you, Your Honor. Garrett Fail
7 from Weil Gotshal. The next two items are just moving
8 forward as a status conference. And our colleague, Bryan
9 Podzius, will present the status update for you.

10 MR. DUEDALL: Your Honor, this is Mark Duedall.
11 May I be excused?

12 THE COURT: Yes, certainly.

13 MR. DUEDALL: Thank you very much, Judge.

14 MR. PODZIUS: Good morning, Your Honor. It's
15 Bryan Podzius, Weil Gotshal & Manges for the Debtors. Can
16 Your Honor hear me okay?

17 THE COURT: Yes, I can hear you fine, thanks.

18 MR. PODZIUS: Great. Items 10 and 11 on the
19 agenda, Your Honor, are the Debtors' 10th and 11th omnibus
20 objections. In these objections, the Debtors have asserted
21 that various proofs of claim should be reclassified on the
22 basis that the goods provided by these claimants were
23 received outside the 503(b)(9) period. These are what the
24 Debtors have referred to as the world imports objection.
25 So, with Your Honor's permission, I would like to give the

1 Court just a brief update on where we are with the few
2 remaining world imports claims.

3 THE COURT: Okay.

4 MR. PODZIUS: Your Honor may remember back in
5 July, you had asked the Debtors to report back to the Court
6 on our progress to determine whether it was appropriate for
7 a substantive hearing to be held on the world imports issue.

8 I am pleased to report that the Debtors have made
9 substantial progress since that hearing. At the time of
10 that July hearing, eight out of the original hundred world
11 imports claims remained outstanding. Through consensual
12 global settlements involving both preference claims and
13 claim exposure, including a settlement with the largest
14 world imports claimant with an asserted value of over \$10
15 million, the Debtors are down to just five outstanding
16 claims. And of those five, we really think there are just
17 two that are left. And I can walk the Court through those
18 in a moment.

19 Subject to final documentation for certain pending
20 settlements, the Debtors have now resolved 98 percent of the
21 total claim amount at issue in those world imports
22 objections. And while a hearing on the world imports issue
23 may be interesting to some, the estate has very limited
24 resources and must be careful before embarking on endless
25 and wasteful litigation in this Court that could surely lead

1 to subsequent litigation in the appellate courts.

2 Given the substantial progress, the Debtors, with
3 the support of the pre-effective date committee, which
4 includes the administrative claims representative and a
5 representative of the UCC, the Debtors believe substantial
6 progress has been made and the remaining world imports claim
7 should be adjourned without date, subject to periodic
8 updates to the Court.

9 And I'd like to just briefly walk through the
10 Court the five remaining claims. And like I said, we really
11 think there are just two left, Your Honor. And of the five
12 remaining claims, Your Honor, two of those claims are
13 creditors who have opted out of the administrative claims
14 consent program and are not entitled to a distribution or
15 reconciliation until the opt-in claims and the non opt-out
16 claims have been paid in full, subject to their applicable
17 caps in the confirmation order.

18 I would note, Your Honor, of these two opt-out
19 claims, the Debtors have reached commercial terms subject to
20 final documentation with one of those two claimants. And
21 that is the Winners claim, Your Honor. The remaining opt-
22 out claim is approximately \$258,000 of world imports
23 exposure.

24 Those were the first two of the five, Your Honor.
25 The next three claims are non-opt-out claims. We believe we

1 have an agreement of commercial terms subject to
2 documentation with one of those three. And the second of
3 those three non-opt-out claims is a claimant that has
4 defaulted in a preference action against it. Accordingly,
5 the Debtors expect to resolve that world imports claim to a
6 motion for default judgement in disallowance of the claim.

7 The final non-opt-out claim, Your Honor, is the
8 claim of HK Sino-Thai trading. This is Mr. Wander's client,
9 who I understand would like -- is requesting a hearing on
10 its client's world imports claim in the amount of \$260,000.

11 I would note, Your Honor, for HK Sino-Thai
12 trading, a preference action has been filed against this
13 claimant. It's Case Number 20-06519. The Debtors have
14 asserted transfers in the amount of \$1.4 million and may be
15 avoidable. This is almost five times the amount of the
16 \$260,000 that is disputed in the world imports objection.

17 Further, HK Sino (sound drops) and the Debtors
18 believe there may be limited, if any assets in the United
19 States. We would agree with comments that Your Honor made
20 back in July that claimants who are subject to a preference
21 should resolve their claim exposure with their preference.

22 Indeed, with respect to HK Sino, it makes even
23 more sense, Your Honor, to resolve the claim with a
24 preference where the asserted preference value is almost
25 five times the amount of the world imports exposure.

1 Even more, regardless of any outcome on the world
2 imports dispute, the Debtors would exercise all of their
3 rights under Section 502(d) of the Bankruptcy Code to
4 withhold payment while the preference action is pending,
5 especially in this instance where there may be limited, if
6 any, U.S. assets to realize on that preference.

7 Given those facts, the Debtors have made a
8 determination in their business judgement with the support
9 of the pre-effective date committee to adjourn their own
10 objection and resolve these claims at the appropriate time
11 for the Court's instruction.

12 Your Honor, to summarize, the Debtors have made
13 substantial progress, taking into account the commercial
14 agreements reached. We believe we are at 98 of the 100
15 world imports claimants resolved, and we think those
16 remaining objections should be adjourned without at date.

17 And with that, Your Honor, that concludes my
18 status conference on the world imports claims. I'm happy to
19 answer any questions Your Honor may have.

20 THE COURT: Well, let me ask you. In respect of
21 the unresolved claims where you've stated that there is
22 agreement as to commercial terms, how have those agreements
23 -- I think there are two of them, two out of five -- how
24 have they so thus far been memorialized?

25 MR. PODZIUS: So those two claims, Your Honor, one

1 of them we believe was -- assuming the documentation is
2 completed, it's below the relevant threshold in our claims
3 settlement procedures order and would be resolved without
4 further notice given it's a relatively small amount. The
5 other one, Your Honor, is much larger and is subject to a
6 pending appeal. So we would likely, you know, following
7 discussions with the other side, document that through a
8 stipulation on presentment.

9 THE COURT: So what would the effect -- I'm really
10 focusing on the following. I have encouraged the parties to
11 resolve their objections by agreement. Two of the five
12 remaining so-called world imports claim issues appear to be
13 resolved in principle, but I am concerned that my scheduling
14 a hearing say on a summary judgement type of basis on the
15 world imports issue might cause either party to those
16 agreements to put their pens down in documenting matters if
17 commercial terms have been agreed. And I'm just trying to
18 figure out how locked in those agreements are.

19 MR. PODZIUS: So, Your Honor, with respect to the
20 smaller settlement, we've circulated a settlement agreement
21 to the other side. And with respect to the larger
22 settlement that likely I mentioned will need court approval,
23 that agreement was reached late last night. And we believe
24 we still have yet to circulate settlement documentation. So
25 we do have a little ways to go, Your Honor, in terms of

1 documenting those. And occasionally it can take a little
2 while longer with foreign claimants, but we do hope to get
3 those signed up within the next several weeks for sure.

4 THE COURT: Okay. All right. Okay. I'm happy to
5 -- if other parties -- and I think I see Mr. Wander -- want
6 to be heard on this, that's fine.

7 I can tell you my inclination would be to schedule
8 hopefully on agreed facts -- if not, on a summary judgement
9 type of basis incorporating Rule 56 into the claim objection
10 under Rule 9014 -- this issue for the omnibus in December.
11 I would do it in November, but for my concern that I don't
12 want to cause parties to rethink or renegotiate what they've
13 agreed to in principle as far as the settlement. And it
14 would seem to me that you might need time between now and
15 when we are here next in November to document both
16 settlements.

17 MR. PODZIUS: Understood, Your Honor. And I would
18 just note there is a third claim out there that will be
19 subject to a motion for default judgement.

20 THE COURT: Right. And that will --

21 MR. PODZIUS: And we would hope to resolve that
22 in the same timeline.

23 THE COURT: And that would probably be heard in
24 November as well.

25 MR. PODZIUS: Understood.

1 THE COURT: So with that, I'm happy to hear from
2 Mr. Wander or anyone else.

3 MR. WANDER: Thank you, Your Honor. This is David
4 Wander of Davidoff Hutcher & Citron, counsel for Orient
5 Craft and HK Sino.

6 Your Honor, I have a lot to say. But if Your
7 Honor is going to schedule the world imports matter for the
8 December omnibus, I will not -- I'll not put all the other
9 matters, comments that I was going to make. And I'm fine
10 with that, Your Honor. That would be great.

11 THE COURT: Okay.

12 MR. WANDER: I think that if Your Honor does set a
13 firm date, I think that would increase the likelihood of a
14 settlement. And as long as there is no firm date, I think
15 there won't be a settlement. And if we can settle, then now
16 that more than a year has gone by, I think it's appropriate
17 that we get a ruling from the Court.

18 THE COURT: Okay.

19 MR. WANDER: So December would be fine.

20 THE COURT: All right. It seems to me at this
21 point based on what I've just heard, the interests of the
22 estate as a whole are pretty evenly balanced as far as the
23 cost of going forward with the interests of the remaining
24 claimants. Before then, I think there was a legitimate
25 reason to give the Debtors time to try to resolve as many of

1 these claims as they could given that they were in fact
2 resolving them and have continued to. But at this point
3 based on the size of the remaining claims, the cost of the
4 litigation -- which, again, it would appear to me to be done
5 either on agreed facts or under Rule 7056 -- the claimants'
6 interests and the estates interests are pretty evenly
7 balanced. Both sides have basically the same interest in
8 avoiding expensive litigation -- or not expensive -- in
9 avoiding litigation, avoiding the cost of litigation or risk
10 of litigation. And we should go ahead with it in December.
11 That would give the Debtors time to conclude the agreements
12 of principle and the parties time to give me a factual
13 record.

14 I don't want to have the December hearing be an
15 evidentiary hearing. I don't think you need one. I think
16 you have the dates and the underlying documents as far as
17 shipping orders and the like. So I would incorporate for
18 purposes of the December omnibus hearing on these what would
19 appear to be two remaining claims, unless for some reason I
20 don't grant the default on the preference claim, be
21 conducted as a summary judgment type of matter,
22 incorporating Rule 7056 through 9014 to the contested
23 claims.

24 I don't know if the other claimant's counsel is on
25 the phone. Which claim would that be?

1 MR. PODZIUS: Your Honor, it's Bryan Podzius, Weil
2 Gotshal. I think -- Mr. Wander can correct me, but I
3 believe he represents both the remaining non-opt-out and the
4 remaining opt-out claimants.

5 THE COURT: Is that right, Mr. Wander? You
6 represent, besides HK Sino, the other one too?

7 MR. WANDER: Yes, Your Honor. Orient Craft. And
8 if I may make one comment, Your Honor, with regard to what
9 Your Honor said about Rule 56 and summary judgment. I think
10 there are threshold legal issues that were supposed to be
11 determined, what we call the world imports issue. And I
12 think there were unresolved discovery disputes that we
13 weren't even going to deal with until we got past the simple
14 legal issue. So I don't know that --

15 THE COURT: Well, I don't know about that. I
16 mean, I need -- I mean, the world imports issue only comes
17 into play if the facts are X. And I thought those facts had
18 been agreed as to what the -- you know -- let me be clear.
19 Maybe you're saying the same thing, Mr. Wander. When I'm
20 talking about the determination of the world imports issue,
21 I'm not talking about other issues that may pertain to these
22 claims, such as the dollar amount or whether there was some
23 portion subsequently repaid, or whether some of the goods
24 were defective. I'm just focusing on the facts pertaining
25 to delivery, FOB, those terms that tie right into world

1 imports.

2 MR. WANDER: Yes, that's fine, Your Honor.

3 THE COURT: Okay, so --

4 MR. WANDER: On that I agree. There were other
5 defenses. But for purposes of the world imports issue, I
6 agree with Your Honor. I don't think the facts are in
7 dispute.

8 THE COURT: All right. So I would ask you and
9 whoever is going to be handling this from the Debtor side to
10 meet and confer to make sure that there are no disputed
11 issues pertaining to the world -- no disputed fact issues
12 pertaining to the world imports issue and tee it up for me
13 either with agreed facts, or if you can't agree, Rule 7056
14 statements pointing to the record so I can see whether there
15 is a material fact in dispute as to the world imports issue.
16 And it's only that issue that I would hear at the December
17 omnibus date, not other defenses.

18 MR. WANDER: Yes, Your Honor. This is David
19 Wander. And I'll do that with Debtors' counsel before the
20 next omnibus hearing. So if there are any issues, we could
21 address it then.

22 THE COURT: Okay. And again, I urge you and your
23 clients and the Debtors to see whether you really need to do
24 this in light of the other defenses, potential preference
25 exposure, et cetera. But I think at this point it would be

1 helpful for the overall process to schedule that hearing.

2 So it will be on for the December omnibus date.

3 MR. WANDER: Thank, you, Your Honor.

4 THE COURT: Okay, very well.

5 MR. PODZIUS: Thank you, Your Honor. It's Bryan
6 Podzius, Weil Gotshal. That concludes the agenda I believe
7 for today, Your Honor.

8 THE COURT: I think that's right. Does anyone
9 disagree? Is anyone else on that thinks there is another
10 matter on the calendar?

11 Okay, I'll ring off then. Thank you very much.

12 (Whereupon these proceedings were concluded at
13 11:00 AM)

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I N D E X

RULINGS

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde

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